

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs June 20, 2006

STATE OF TENNESSEE v. RANDALL S. SPARKS

**Direct Appeal from the Criminal Court for Overton County
No. 5764 Leon C. Burns, Jr., Judge**

No. M2005-02436-CCA-R3-CD - Filed August 4, 2006

The appellant, Randall S. Sparks, was convicted of one count of the sale of less than .5 grams of cocaine and one count of the sale of .5 grams or more of cocaine. The trial court imposed a total effective sentence of twelve years incarceration in the Tennessee Department of Correction. On appeal, the appellant challenges the trial court's refusal to give Tennessee Pattern Jury Instruction 42.23 regarding the loss or destruction of evidence and the trial court's denial of a motion for new trial based upon a juror's disclosure after trial that she knew the appellant. Upon review of the record and the parties' briefs, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court are Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which DAVID G. HAYES and THOMAS T. WOODALL, JJ., joined.

John Milton Meadows, III, Livingston, Tennessee, for the appellant, Randall S. Sparks.

Paul G. Summers, Attorney General and Reporter; David E. Coenen, Assistant Attorney General; William Edward Gibson, District Attorney General; and John A. Moore, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

_____ At trial, Conner Wardlaw testified that he was employed by the Jackson County Sheriff's Office and was assigned to the Middle Tennessee Drug Task Force. On January 7, 2004, Agent Wardlaw went to Livingston to participate in an undercover purchase of narcotics. Agents Bill Randolph and Brent Farley were also assigned to the case. Assisting the agents was a confidential

informant who, for security reasons, was known to the agents only by his code name "Titan." Before the purchase, the agents and the confidential informant met at a secured location where the agents marked the cash to be used in the purchase, searched the confidential informant and his vehicle for contraband, and placed a monitoring device on Agent Wardlaw. Agent Wardlaw recalled that no contraband was found on the confidential informant's person or in his vehicle. Agent Wardlaw explained that for officer safety, the other agents typically monitored the purchase via an electronic monitoring device. Additionally, he noted that the agents typically recorded all undercover transactions. He stated that the agents tested the monitoring device before the purchase and believed that it was working properly.

After the preparation for the purchase was completed, the confidential informant and Agent Wardlaw drove to the residence of Rachel Stamps. After the confidential informant honked the horn of the vehicle, Stamps came outside of her residence. The confidential informant asked Stamps if she knew where he and Agent Wardlaw could obtain powder cocaine. Stamps replied that they could purchase cocaine from "Petey," who was later identified as the appellant.

Stamps got into the vehicle with the confidential informant and Agent Wardlaw, and they drove to the appellant's residence, a mobile home located at 902 ½ Chestnut Street in Livingston. Upon their arrival, Stamps waited in the vehicle while the confidential informant and Agent Wardlaw approached the front door of the residence. They knocked, and the door was answered by Debra Ford. She let them in and invited them to sit in the living room. The confidential informant remained standing while Agent Wardlaw sat on one of the couches. A small child was positioned near the other couch.

The confidential informant asked Ford about the appellant's location. Ford replied that she did not know where the appellant was, then she asked what they wanted. Agent Wardlaw handed fifty dollars of the "buy-money" to the confidential informant who in turn handed the money to Ford.

Ford took the money, walked through the adjoining kitchen to a hall, and stopped before the door leading to the first bedroom on the left. Agent Wardlaw observed her movements from the living room. Ford knocked on the door, and the appellant peeked out from the bedroom. Ford handed the money to the appellant, and he then handed her a small plastic baggie of white powder. Agent Wardlaw believed the white powder to be cocaine. The appellant shut the door, and Ford returned to the living room.

When she arrived in the living room, Ford handed the baggie of cocaine to the confidential informant. The confidential informant then passed the baggie to Agent Wardlaw. The confidential informant thanked Ford, then he and Agent Wardlaw left the residence. They drove Stamps home before proceeding to the secured location. When they arrived, Agent Wardlaw relinquished custody of the cocaine to Agent Randolph.

_____ On January 11, 2004, the task force conducted another undercover purchase of narcotics from the appellant. The confidential informant and Agent Wardlaw again participated in the operation.

Also present were Agent Randolph, Agent Farley, Agent Freddie Stewart, and Agent Wardlaw's supervisor, Special Agent In Charge Joe Copeland. The agents marked \$400 in cash that was to be used for the purchase, searched the confidential informant and his vehicle, and placed a monitoring device on Agent Wardlaw.

Agent Wardlaw and the confidential informant proceeded directly to the appellant's residence. They entered the living room where they stood for a short time. The appellant's wife, Tonya Sparks, was sitting with a child in the floor, playing a board game. The appellant was sitting at the kitchen table, cutting up used marijuana cigarettes and rolling new marijuana cigarettes. The confidential informant asked the appellant about purchasing cocaine. The appellant got up and went into the first bedroom on the left side of the hall. He came out with a bag that had a picture of a strawberry on the side. The bag contained eight smaller plastic baggies of white powder that appeared to be cocaine.

When the appellant came into the living room, he tried to hand the bag of cocaine to the confidential informant. However, Agent Wardlaw reached for the bag instead and handed the appellant \$400. The agent told the appellant that he did not use cocaine; he sold it and would therefore need more cocaine in the future. The appellant said that he could probably get \$3,000 or \$4,000 worth of cocaine, so the agent should check back with him later. Agent Wardlaw and the confidential informant left the appellant's residence and returned to the secured location. There, Agent Wardlaw relinquished custody of the cocaine to Agent Randolph.

_____ Agent Wardlaw recalled that a few months later, he received a call on his cellular telephone. On the other end of the line, two men cursed Agent Wardlaw. The agent recognized that the appellant was one of the men speaking. The appellant told Agent Wardlaw that he knew he had sold the agent drugs, and the agent had "messed up." Agent Wardlaw did not write down the telephone number displayed on his telephone's caller identification system. Therefore, the number was never traced. Regardless, the appellant later admitted calling the agent. Agent Wardlaw noted that police were never able to recover any of the marked money from the appellant.

Agent Bill Randolph testified that he was employed with the Livingston Police Department and was assigned to the Middle Tennessee Drug Task Force. He was the case agent in charge of the purchases conducted on January 7 and 11, 2004. He stated that he performed the searches of the confidential informant and his vehicle before the purchases; on both occasions, no contraband was found.

Agent Randolph explained that at the time of the purchases, the Middle Tennessee Drug Task Force was relatively new. The task force had just received new monitoring equipment, otherwise known as "KEL" sets. Agent Randolph said that the agents were familiar with the old "KEL" sets and knew that the old sets immediately recorded the events the agents were monitoring onto an audio cassette tape. However, the agents were unfamiliar with the new digital sets which could record events onto a disk. Agent Randolph stated:

You have to stop on the new digital KEL sets to actually get it to read to a memory disk, and if you don't follow the proper procedures, it doesn't store the memory of the disk. The KEL set actually works on two parts. You can actually monitor it without recording, and you can monitor what's going on and record it. And our purpose is to try to do both, is to listen to what's going on and record the conversations, both.

Agent Randolph testified that he was able to monitor the purchases on both occasions, and at the time he believed that audio recordings were being made. However, he explained that the sets have pause and stop buttons and "after the recording is going on, if you don't hit the 'stop' button, it doesn't read it onto the disk. If you just power the unit down, it erases everything." Agent Randolph admitted that during both purchases, "We just powered it down. We hadn't had that much experience using the new system, and we just turned the power off and it cleared the memory. And we did not know anything about this until we came back to try to listen to see what was on the disk." Agent Randolph stated that no one had listened to the disk between the time the January 7th purchase and the January 11th purchase; accordingly, during the second purchase they followed the same procedures they had employed previously and again did not obtain a recording of the events. Agent Randolph stated that the machinery was working properly, and the error in recording was his fault because at that time he did not know how to correctly operate the equipment.

Agent Brett Trotter with the Tennessee Bureau of Investigation crime laboratory testified that the white powder purchased on January 7, 2004, was submitted for testing. Agent Trotter determined that the substance was .3 grams of the Schedule II drug cocaine. The white powder from the January 11, 2004, purchase was determined to be 2.3 grams of cocaine.

Based upon the foregoing evidence, the appellant was convicted of selling less than .5 grams of cocaine on January 7, 2004, and selling .5 grams or more of cocaine on January 11, 2004.¹ On appeal, the appellant challenges the trial court's refusal to give Tennessee Pattern Jury Instruction 42.23 involving the loss or destruction of evidence and the trial court's refusal to grant a new trial based upon a juror's admission after trial that she had met the appellant prior to trial. We will address each of these issues in turn.

II. Analysis

A. Tennessee Pattern Jury Instruction 42.23

¹ The record reflects that the jury returned guilty verdicts on multiple counts involving the events of January 7 and multiple counts involving the events of January 11. The transcript of the proceedings indicates that the trial court properly merged the convictions into a single conviction for the events of January 7 and a single conviction for the events of January 11. However, the technical record and one judgment of conviction suggest that all but a single conviction for the events of January 7 and a single conviction for the events of January 11 were dismissed or nolle. Regardless, we note that where there is a conflict between the judgments of conviction and the transcript, the transcript controls. See State v. Davis, 706 S.W.2d 96, 97 (Tenn. Crim. App. 1985).

_____ On appeal, the appellant argues that the trial court should have “instruct[ed] the jury on the prosecution’s duty to gather, produce and preserve evidence as set forth in T.P.I.-Crim. 42.23.” He claims that the instruction was warranted “in light of the State failing to preserve digital audio recordings of two separate drug transactions.” The State claims that the instruction was not warranted because the evidence never existed.

Initially, we note that the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 8 of the Tennessee Constitution afford every criminal defendant the right to a fair trial. See Johnson v. State, 38 S.W.3d 52, 55 (Tenn. 2001). As such, the State has a constitutional duty to furnish a defendant with exculpatory evidence pertaining to the defendant’s guilt or innocence or to the potential punishment faced by a defendant. See Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97 (1963).

In State v. Ferguson, 2 S.W.3d 912 (Tenn. 1999), our supreme court addressed the issue of when a defendant is entitled to relief when the State has lost or destroyed evidence that was alleged to have been exculpatory. The court explained that a reviewing court must first determine whether the State had a duty to preserve the lost or destroyed evidence. Ferguson, 2 S.W.3d at 917. Ordinarily, “the State has a duty to preserve all evidence subject to discovery and inspection under Tenn. R. Crim. P. 16, or other applicable law.” Id. However,

“[w]hatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect’s defense. To meet this standard of constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.”

Ferguson, 2 S.W.3d at 917 (quoting California v. Trombetta, 467 U.S. 479, 488-89, 104 S. Ct. 2528, 2534 (1984) (footnote and citation omitted)).

If the proof demonstrates the existence of a duty to preserve the evidence and further shows that the State has failed in that duty, a court must proceed with a balancing analysis involving consideration of the following factors:

1. The degree of negligence involved;
2. The significance of the destroyed evidence, considered in light of the probative value and reliability of secondary or substitute evidence that remains available; and
3. The sufficiency of the other evidence used at trial to support the conviction.

Id. (footnote omitted). If the court's consideration of these factors reveals that a trial without the missing evidence would lack fundamental fairness, the court may consider several options. For example, the court may dismiss the charges or, alternatively, provide an appropriate jury instruction. Id. A curative instruction was suggested by the Ferguson court, see id. at 917 n.11, and this instruction later became Tennessee Pattern Jury Instruction 42.23.

As the first step in our analysis, we must determine if the challenged evidence ever existed. Notably, we can find no case law in this state that indicates that Ferguson applies to evidence that never existed. On the contrary, this court has repeatedly refused to grant Ferguson relief when there was no proof that the alleged evidence existed. See State v. Timothy D. Prince, No. M2004-01262-CCA-R3-CD, 2005 WL 1025774, at *4 (Tenn. Crim. App. at Nashville, May 3, 2005); State v. Linda H. Overholt, No. E2003-01881-CCA-R3-CD, 2005 WL 123483, at *6 (Tenn. Crim. App. at Knoxville, Jan. 21, 2005), perm. to appeal denied, (Tenn. 2005); State v. George R. Croft, No. W2001-00134-CCA-R3-CD, 2002 WL 31625047, at **6-7 (Tenn. Crim. App. at Jackson, Nov. 20, 2002).

We note that the State had no obligation to record the transactions; however, if recordings had been made, there was a duty to preserve such recordings. Nevertheless, the record reflects that in the instant case, recordings of the purchases were never made. The trial court implicitly accredited Agent Randolph's explanation of the error in recording the purchases. Agent Randolph testified that because of the lack of knowledge regarding the equipment, the recordings were never made. Accordingly, like the trial court, we conclude that a curative instruction was not warranted in this case. See Prince, No. M2004-01262-CCA-R3-CD, 2005 WL 1025774, at *4; Croft, No. W2001-00134-CCA-R3-CD, 2002 WL 31625047, at **6-7.

B. Juror Misconduct

As his final issue, the appellant argues that "the Trial Judge erred in denying [the appellant's] motion for new trial due to a juror's failure to disclose relationship with [the appellant], Co-defendant, and members of [the appellant's] family." At the appellant's motion for new trial, the appellant called juror Janice Buck as a witness. Buck testified that she managed Martin Street Apartments in Livingston and had been doing so for two years. Before becoming the manager, Buck had visited the apartment complex occasionally because her husband did maintenance work there and her mother-in-law was a resident. Buck stated that there were six buildings, each containing four apartments for a total of twenty-four apartments in the complex.

Buck stated that the appellant and his then girlfriend Tonya Ford had lived at the apartment complex before Buck became the manager.² However, they had moved from the complex before she started the job. The appellant's mother, Mary Sparks, also lived in the complex; however, she moved three or four months after Buck became manager. Buck had not seen Sparks since she moved. Buck stated that she had no disputes with Sparks, the appellant, or Ford, explaining that she

² Tonya Ford later became the appellant's wife.

saw each of them only occasionally, usually in passing. Buck recalled that she once saw Sparks' live-in boyfriend beat his dog, and she was distressed by the incident. Regardless, she stated that she had no opinion about Sparks' character or that of her boyfriend.

Buck recalled that Ford moved out of the apartments owing rent, but she eventually paid all that was owed. Buck maintained that she did not disclose during voir dire that she had met the appellant or his family because at that time she did not recognize the appellant. Buck believed that she realized she knew the appellant in the middle of the trial when Agent Wardlaw testified about seeing the appellant's wife, Tonya, in the floor with their child during one of the purchases. Further, Buck stated, "I have no idea anything about [the appellant] other than just seeing him at and knowing that he is Mary's son. That's all I know about the man." She repeatedly maintained that she did not know anything about the appellant, emphasizing "I don't know anything about [the appellant] whatsoever that would've changed anything."

The appellant's mother, Mary Sparks, testified that she had not been at the appellant's trial because she was sick. She recalled that both she and the appellant had lived at the Martin Street Apartments; the appellant and Ford had moved out of the apartments before Sparks did. Sparks stated that she knew Buck from living in the apartments. She knew that Buck had been at the apartments when her husband performed maintenance and then Buck became the apartment manager. Sparks occasionally spoke with Buck, "just everyday conversation."

When Sparks and her fiancé, Ellis McCoy, prepared to move from the apartments, Buck told Sparks that she hated for them to leave. Before Sparks left, she and McCoy "had words" with Buck over getting their deposit returned to them. Buck called police to escort Sparks and McCoy out of the office during one of the disputes. After three months, Sparks received her deposit.

____ Ellis McCoy testified that he and Sparks moved into the Martin Street Apartments in September 2001. He was familiar with Buck and recalled that she had been the apartment manager. He said that on one occasion Buck saw him "spank" his dog, but he denied ever beating the dog with his fist. He stated that he and Buck argued about refunding the apartment deposit. McCoy remembered that Buck asked an officer to escort McCoy out during one of the arguments.

After the completion of testimony at the motion for new trial hearing, the trial court stated that Buck's realization that she had a prior acquaintance with the appellant was "innocent enough, in that it was not, 'I knew him from the front end, and I sat on the jury and waited to get him' kind of thing." The court found that "based upon what she said . . . the Court would be able to say now that it was not an improper influence on the outcome of the trial, her knowledge, acquaintance with the accused in this case." The court further found that there was ample evidence to support the jury's finding of guilt on both charges.

Criminal defendants have a constitutional right to a trial "by an impartial jury." See U.S. Const. Amend. VI; see also Tenn. Const. Art. I, § 9. Specifically, in Tennessee an accused is constitutionally guaranteed the right to "a trial by a jury free of . . . a disqualification on account of

some bias or partiality toward one side or the other of the litigation.” State v. Toombs, 270 S.W.2d 649, 650 (Tenn. 1954); see also State v. Pender, 687 S.W.2d 714, 718 (Tenn. Crim. App. 1985). As such, voir dire serves an important function by facilitating “the impaneling of a fair and impartial jury through questions which permit the intelligent exercise of challenges by counsel.” State v. Akins, 867 S.W.2d 350, 354 (Tenn. Crim. App. 1993). Knowing a juror’s qualifications is a necessary step preceding a party’s intelligent exercise of its challenges; therefore, jurors must fully and truthfully answer questions during voir dire and must neither falsely represent the facts or conceal any material matter. Id.

Typically, disqualifications of jurors fall into two categories: (1) propter defectum or (2) propter affectum. State v. Furlough, 797 S.W.2d 631, 652 (Tenn. Crim. App. 1990). Objections based on general disqualifications, such as relationship, are within the propter defectum class and must be challenged before a verdict. Durham v. State, 188 S.W.2d 555, 557 (Tenn. 1945). Conversely, propter affectum disqualifications occur when a juror possesses some bias or partiality toward one party in the litigation; these challenges may be made after the verdict is returned in a motion for new trial. See Carruthers v. State, 145 S.W.3d 85, 94 (Tenn. Crim. App. 2003); Furlough, 797 S.W.2d at 652.

“When a juror willfully conceals (or fails to disclose) information on voir dire which reflects on the juror’s lack of impartiality, a presumption of prejudice arises.” Akins, 867 S.W.2d at 355. Silence in the face of questioning “reasonably calculated to produce an answer is tantamount to a negative answer.” Id. However, a presumption of bias may be rebutted by an absence of actual prejudice. Id. at 357. “[T]he court must view the totality of the circumstances, and not merely the juror’s self-serving claim of lack of partiality, to determine whether the presumption is overcome.” Id. The appellant “bears the burden of providing a prima facie case of bias or partiality.” Carruthers, 145 S.W.3d at 95.

In the instant case, Buck testified that she did not know the appellant very well; in fact, she had only a passing acquaintance with him. She further testified that she did not know anything about the appellant that would have affected the verdict. She stated that she had no bias for or against the appellant or any member of his family. She stated that she did not know that she was acquainted with the appellant until the middle of trial when the name of his wife was mentioned. The trial court accredited Buck’s testimony and noted that sufficient evidence existed to support the jury’s verdicts. We conclude that the court’s findings are supported by the record. Moreover, we note that during voir dire, the appellant was identified by name and he was asked to stand. However, the names of his wife and mother were not mentioned to the venire. Further, Buck told defense counsel during voir dire that she managed Martin Street Apartments. She said that she was “close” with many of the residents of the apartments, and she believed them to be “[p]retty good people.” We conclude that any presumption of prejudice was rebutted. The appellant is not entitled to relief on this issue.

III. Conclusion

Finding no error, we affirm the judgments of the trial court.

NORMA McGEE OGLE, JUDGE